Supreme Court, U.S.
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No. 92-1328

In The

Supreme Court of the United States

October Term, 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

REPLY TO BRIEF IN OPPOSITION

BERNARD B. WEKSLER
Counsel for Petitioner
Fifth Floor
Gables International Plaza
2655 LeJeune Road
Coral Gables, FL 33134
(305) 446-2826

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. FLORIDA'S 60% "TAKE", WITHOUT COMPENSATION, IS A VIOLATION OF THE FIFTH AMENDMENT

In its Respondent's Brief, the State of Florida (hereinafter "Florida" or "the State") argues that review of the decision of the Florida Supreme Court in *Gordon v. State*, 608 So. 2d 800 (Fla. 1992) is "unwarranted" because "under Florida law there is no property interest in punitive damages" (Respondent's Brief at 2). Florida essentially reasons that, since "punitive damages may be entirely abolished by the legislature without constitutional implications" (Respondent's Brief at 3), the State may condition an injured tort claimant's use of its courts to recover punitive damages upon the payment into the State's coffers of 60% of any enforceable award or judgment recovered, even though the entire award would otherwise have become the private property of the tort claimant.

Florida's argument contains two fatal flaws. First, Florida ignores the fundamental distinction between its acknowledged power and prerogative, by statutory enactment or judicial pronouncement, to define and redefine the scope and extent of private property rights and its asserted power, by *ipse dixit*, to redefine a private property right so as to give the State or its designate a supramajority ownership interest in such right. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1990), Florida might constitutionally have chosen to limit the amount of interest that could be earned on interpleader funds while on deposit in the registry of the county court by enacting a statute lowering the legal rate of interest. Similarly, Florida could have directed that all interpleader funds, while in the registry of the county court, be deposited in noninterest-bearing accounts. Indeed, this Court in *Webb's* "accept[ed] the proposition . . . that, apart from statute, Florida law does not

require that interest be earned on a registry deposit." *Id.* at 161.

On the other hand, this Court concluded in *Webb's* that, even though Florida could have repealed the statute permitting interest to be earned on a registry deposit, Florida could not give either itself or its counties ownership of the interest so earned. Thus, the Court reasoned as follows:

> To be sure, [*Fla.Stat.Ann.*] § 28.33 establishes as a matter of Florida law that interest is to be earned on deposited funds. *But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.*

Id. at 162 (emphasis added).

In the case at bar, Florida admittedly could have restricted or even entirely abolished the recovery of punitive damages in civil actions for intentional torts. Florida, however, did not choose to do this. Rather, Florida is again attempting, by *ipse dixit*, to assume an ownership interest in a private property right and thereby transform private property into public property without the payment of just compensation. And, just as in *Webb's Fabulous Pharmacies*,[1] Florida once again trots out the flawed proposition that it may take all or part of the private property interest created by its law (*See* Respondent's Brief at 2 ("[i]t is Florida law that permits the imposition of the punitive penalty under certain circumstances")).

The other basic flaw in Florida's argument is its misleading assertion that "under Florida law there is no property interest in punitive damages" (Respondent's Brief at 2). This is not the law of Florida. In *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950), the Florida Supreme Court set forth the true rule:

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[1] Not surprisingly, Florida nowhere addresses or attempts to distinguish *Webb's* in its Respondent's Brief. *Webb's* was cited in page 13 of Petitioner's Petition for Writ of Certiorari.

> The right to have punitive damages assessed is not property; and it is the general rule that, *until a judgment is rendered,* there is no vested right in a claim for punitive damages.

Id. at 414 (emphasis added and citations omitted). Thus, under Florida law, a tort claimant obtains a property interest in punitive damages upon the entry of a judgment.

Indeed, Florida takes the position that *Fla. Stat. Ann.* § 768.73(2)(b) "requires that the state and the claimant's interest in the punitive damage award vest simultaneously, *that is, upon entry of the final judgment*" (Respondent's Brief at 8) (emphasis added). In other words, Florida impliedly concedes that in the absence of *F.S.A.* § 768.73(2)(b), Mr. Gordon would have obtained a vested property right under Florida law to 100% of the enforceable punitive damages "award" or judgment.

In fact, Florida did not assert its right to payment of 60% of the punitive damages award until after a judgment for the entire amount of the punitive damages assessed by the jury had been entered by the trial court (A-1), and Gordon had obtained thereby a vested property right in the award (A-23). The Judgment was affirmed on appeal. *K-Mart Corp. v. Gordon,* 565 So. 2d 834 (Fla. 3d DCA 1990) It makes no difference that the "entire amount of the punitive damage award was erroneously entered by the trial court in [Gordon's] favor" (Respondent's Brief at 4) since any such error or mistake stemmed from the operation of the statute itself. At the time the original judgment was entered on July 27, 1989, the statute neither made the State a party to the litigation, nor designated the State a judgment creditor, nor provided any prejudgment procedure or mechanism for implementing § 768.73(2)(b). The only viable mechanism for asserting the State's statutory entitlement to 60% of the award was a postjudgment motion.

Florida baldly asserts that § 768.73(2)(b) does not constitute a taking because Mr. Gordon "never owned the punitive damage award in question" (Respondent's Brief at 3). This assertion is akin to the discredited reasoning of the Florida Supreme Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra,* that " 'there is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property.' " 449 U.S. at 158-59 (quoting *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952-53 (Fla. 1979), *rev.'d*, 449 U.S. 155 (1980)). Mr. Gordon purportedly did not become the owner of 100% of the punitive damages "award" or judgment only because Florida enacted a statute that, merely by the State's own say-so, transformed 60% of any such award or judgment into public property. By arbitrarily staking out an "entitlement" (Respondent's Brief at 8) to a supra-majority ownership interest in any enforceable award or judgment for punitive damages recovered by an injured tort claimant, the statute exacts a "forced contribution to government revenues" that "is not reasonably related to the costs of using the courts." 449 U.S. at 163. The statute thereby takes Mr. Gordon's and other injured tort claimants' private property without just compensation.

Florida similarly argues that, in view of the enactment of § 768.73(2)(b), Mr. Gordon "never had a right to receive more than forty percent (40%) of the punitive damage award" (Respondent's Brief at 3) even though Gordon contributed 100% of the time, money, and effort that went into recovering the award. Just as Florida did not contribute any of the principal that generated the interest earned in *Webb's Fabulous Pharmacies,* the State here contributed nothing toward the cost of prosecuting Gordon's claim for punitive damages. Nor may Florida accomplish the grabbing away of the lion's share of the punitive damages award or judgment by, in effect, recharacterizing Gordon's private expenditure of time, money and effort in pursuit of his claim for punitive

damages as a "public" prosecution "to further the social policy of punishing egregious misconduct" (Respondent's Brief at 2). See *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra,* 449 U.S. at 164. Furthermore, Gordon's attorney did not volunteer to serve the State as an unpaid Special Attorney General and obtain a windfall for the State without receiving a *quid pro quo.*

With respect to the remark that "the injured tort claimant does not pay the punitive award, the Defendant does" (Respondent's Brief at 2), Florida fails to recognize that an injured tort claimant pays with his or her own time, energy, motivation, money, attorney's services, and effort to prosecute to a successful conclusion a claim for punitive damages. A claim for which the State has not prosecuted against the Defendant in the criminal courts. The recovery of an enforceable award or judgment for punitive damages represents the fruit of that time, effort, and expense. Florida, on the other hand, does not pay one penny or devote one minute of an assistant attorney general's time toward the recovery of punitive damages awards in private civil suits. Yet, by statute, it claims the lion's share of the fruits of the injured tort claimant's efforts. Not only is Mr. Gordon "no longer happy with the size of the carrot" (Respondent's Brief at 1) left after Florida takes its huge 60% bite,[2] he is equally unhappy with a freeloading State, much like Peter Rabbit, swallowing most of the carrot without even reimbursing Gordon

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[2] Even the Florida legislature evidently had second thoughts about the size of this bite as it later amended *F.S.A.* § 768.73(2)(b) to reduce the share of punitive damages payable to the State from 60% to 35%. 1992 *Fla. Laws* ch. 92-85, § 2 (effective Apr. 8, 1992). The Florida legislature apparently agreed that 60% was "too great a take" "by any standard of excessiveness" and therefore constituted an unconstitutional taking. *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989).

for a proportionate share of the time, money, and effort that Gordon invested in growing it.[3]

This Court need not conclude that "all citizens have a federal constitutional right to punitive damages" (Respondent's Brief at 3) in order to grant the Petition. All the Court need find is that Florida has arrogated to itself, without paying any compensation, a 60% ownership interest in an enforceable award or judgment for punitive damages that, under Florida law, would otherwise be or become the property of the injured tort claimant.

II. THE EIGHTH AMENDMENT DOES APPLY AND IS VIOLATED WHEN THE STATE FINES, SEIZES AND EXTORTS 60% OF THE PUNITIVE DAMAGES AWARD

Florida argues that "an excessive fines analysis" has no application here because Mr. Gordon did not have a property interest in the award or judgment for punitive damages (Respondent's Brief at 6). In fact, Gordon obtained a vested property right when the circuit court

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[3] The State argues that there is no "federal question conflict" between the Florida Supreme Court's decision in *Gordon v. State, supra,* and *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), because a property interest vested in *Kirk* while in *Gordon* it did not (Respondent's Brief at 8-9). Florida fails to acknowledge that a property interest in the entire punitive damages award vested when the circuit court entered a judgment in Gordon's favor for the full amount of the award (A-1, A-23).

In addition, Chief Justice Rovira's dissenting opinion in *Kirk v. Denver, supra,* rests on the faulty premise that, as the State may completely eliminate punitive damages in civil cases, it likewise has the power to condition a statutory grant of authority to recover such damages upon the State's obtaining a substantial ownership interest in the judgment. 818 P.2d at 273-76. This premise, that the State may take all or part of what it permits to be created, was condemned by this Court in *Webb's Fabulous Pharmacies.*

entered a Final Judgment for the entire amount of the punitive damages award in Gordon's favor (A-1, A-23). The Judgment was affirmed on appeal. *K-Mart Corp. v. Gordon*, 565 So. 2d 834 (Fla. 3d DCA 1990). Thereafter, the State extracted 60% of the $512,000.00 punitive damages portion of the Judgment solely for the purpose of raising revenue and in effect, punishing or fining Mr. Gordon.

Even under Florida's view, the State extracted 60% of a punitive damages award that would have otherwise become the vested property right of Mr. Gordon in its entirety. The practical effect of the extraction is the same regardless of whether the forfeiture so imposed is viewed as divesting an already vested property right or is viewed as wrongfully preventing a property right from vesting in the injured tort claimant. In either case, Florida is using the civil courts, not the criminal courts, to extract large forfeiture/payments for the purpose of raising revenue, thus squarely presenting the issue reserved for future decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelso Disposal, Inc.*, 492 U.S. 257, 275 (1989). Mr. Gordon, as the injured tort claimant whose punitive damages award was arbitrarily reduced to 40% of its original $512,000.00 by Florida's imposition of this excessive fine and forfeiture, clearly has standing to raise this Eighth Amendment issue.

Florida admits in page 6 of its Brief, that a tort defendant having a punitive damages award imposed against him in a jurisdiction recognizing "state sharing" might have an Excessive Fines clause argument and cites *Browning-Ferris*. Therefore it would logically follow that the injured tort claimant having a punitive damages award imposed in his or her favor in a jurisdiction recognizing and imposing "state sharing", would also have an Excessive Fines argument. In the final analysis, the person who suffers the most by the "state sharing" of 60% as in Florida or 75% as in Georgia, is the suffering and damaged claimant. The wrongdoer does not pay any more and has caused more harm to the injured Mr., Ms.,

or Mrs. Gordons in Florida and seven other "state sharing" states.

III. FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAUSE HAS BEEN VIOLATED

Florida argues that Gordon "fails to explain how a wrongdoer who has to pay a punitive damage award is any less deterred if a portion of the award goes to the State instead of to the Plaintiff" (Respondent's Brief at 7). The State, however, fails itself to explain how a wrongdoer who has to pay a punitive damages award is any *more* deterred if a portion of the award is confiscated by the State. Indeed, most wrongdoers will reap a benefit from the State's confiscation of a large part of the punitive damages awards entered against them since most wrongdoers are taxpayers and residents of the State whose taxes will be lowered or public services increased from the forced diversion of large portions of civil punitive damages awards to the State General Revenue Fund.

As for the comments taken from the concurring opinion of Justice Shores in *Fuller v. Preferred Risk Life-Insurance Co.*, 577 So. 2d 878 (Ala. 1991), Justice Shores failed to address the constitutional implications of his suggestion of selective, court-ordered confiscation of punitive damages awards. Regardless of whether such confiscation would serve some public purpose, a State may not take the well-deserved fruits of a private party's time, money, and labor without paying that party just compensation.[4] Moreover, none of the Florida courts in this case

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[4] Interestingly enough, Justice Shores does recognize that the plaintiff's attorney fees should be based upon the total verdict, and not the reduced amount paid to the plaintiff, *since it is due to the [plaintiff's] attorney's efforts that the public interest has been served.*

Id. at 887 (emphasis added). Indeed, most of the punitive damages "sharing" statutes that have been enacted, unlike *F.S.A.*

made a judicial finding that Mr. Gordon, who was falsely imprisoned and battered by employees of K-Mart Corporation, would have received an "undeserved windfall" if he had been allowed to retain the entire amount of the punitive damages award. *See id.* at 886 wherein Justice Shores stated that "*sometimes* an award does constitute an undeserved windfall to the plaintiff" (emphasis added).[5] This is clearly not a "proper case," *id.* at 887, for a selective reduction of the plaintiff's punitive damages recovery. The only "undeserved windfall" in this case is that being reaped by Florida in confiscating, 60% of the award while paying 0% of the attorney's fees and litigation expenses.

The State of Florida was not a party to the litigation nor did the offending statute § 768.73(2)(b) grant Florida the status of a judgment creditor. The jury cannot even be instructed or informed that the State is to receive any part of the punitive damages award. Fla. Stat. Ann. § 768.73(5).

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§ 768.73(2)(b), provide for the deduction of attorney's fees and/or costs or expenses *before* a stated percentage share of the punitive damages award is directed to be paid into the state treasury, general revenue fund, or other public fund. *Ga. Code Ann.* § 51-12-5.1(e)(2); *Mo. Ann. Stat.* § 537.675; *Or. Rev. Stat.* § 18.540(1)(c); *Utah Code Ann.* § 78-18-1(3).

[5] The plantiff insured in *Fuller,* who sued the defendant insurer for breach of contract and fraud based upon her insurer's refusal to pay certain claims made on her health and hospitalization insurance, recovered a punitive damages award of $1 million even though she only sought a total of $250,000 in both compensatory and punitive damages in her complaint.

CONCLUSION

In view of the reasons and authorities set forth above, as well as in the Petition for Writ of Certiorari, Petitioner Harvey Gordon urges this Court to issue a Writ of Certiorari, invalidate as unconstitutional the Florida punitive damages taking/sharing statute, Fla. Stat. Ann. § 768.73(2)(b), and remand this matter to the Florida Supreme Court with directions to reinstate the trial court's Final Judgment of July 27, 1989, and to order the State of Florida to return the 60% "take" plus accrued interest to the Petitioner.

Respectfully submitted,

BERNARD B. WEKSLER
Counsel for Petitioner
Fifth Floor
Gables International Plaza
2655 LeJeune Road
Coral Gables, FL 33134
(305) 446-2826